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## **European Immigration Controls Conforming to Human Rights Standards**

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*The European continent has for some years been facing increased pressure from migration. In 2010, Europe, in comparison with the other continents, was expected to host the largest number of migrants: 69.8 million migrants representing 32.6 percent of the total flow of migrants (213.9 million international migrants). This pressure has caused the two main European organizations, the Council of Europe and the European Union, to act decisively for the protection of migrants. Although the European legal order offers a high standard of human rights protection—having adopted, over the decades, the relevant instruments and developed effective mechanisms—the two European organizations have used and continue use all legal tools, such as resolutions and recommendations, provided by their internal order.*

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### **Migration Management, Border Control, and Human Rights**

The right to freedom of movement is guaranteed under Article 2, Protocol no. 4 of the European Convention on Human Rights (ECHR), which states in its second paragraph that “everyone shall be free to leave any country, including his own.” In addition, Article 18.4 of the European Social Charter guarantees the right of nationals to leave their own country in order “to engage in a gainful occupation in the territories of the other Parties.” Nevertheless, as a general principle, the ECHR (like the European Social Charter) does not guarantee the right of an alien to enter and remain in the territory of a member state, nor does it guarantee the right to asylum.

In exercising control of their borders, however, European states must act in conformity with ECHR standards. In *East African Asians v. the United Kingdom*, the European Commission on Human Rights held that racial discrimination in immigration control is incompatible with the ECHR.<sup>1</sup> It found that the United Kingdom had exceeded its right and violated the ECHR by subjecting the residents of colonies of East Africa, who were of Asian origin, to immigration control while they were already citizens of the United Kingdom. The European Commission on Human Rights found that this differential treatment of a group of persons on the basis of “race” fell short of the principle of human dignity and constituted degrading treatment contrary to Article 3 of the ECHR. This approach has been confirmed by the European Court of Human Rights (ECtHR) in the interstate case *Cyprus v. Turkey*.<sup>2</sup>

Moreover, in certain categories of cases, member states may be required by the ECHR to permit a migrant to enter or to remain: where a migrant meets the criteria requiring protection of his or her life (Article 2 ECHR) or of his or her physical integrity (Article 3 ECHR);<sup>3</sup> or where deportation or extradition of an alien who has strong family ties in the country concerned could violate the right to respect for his or her family life (Article 8 ECHR).<sup>4</sup>

The obligation states have to protect all human beings within their jurisdiction against violations of their rights by third parties or agents of the state includes the entry process and reception of aliens. Thus, states must ensure that non-nationals will not be arbitrarily

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deprived of their life (Article 2 ECHR) or be subject to physical or mental ill-treatment amounting to torture or inhuman or degrading treatment or punishment (Article 3 ECHR). Accordingly, aliens in the entry process should be protected against excessive physical restraint or inappropriate and unnecessary body searches.<sup>5</sup>

Further, when aliens are held in reception centers and deprived of their liberty for immigration control purposes, they should be guaranteed adequate conditions and access to health and adequate food. They also have the right to be protected against discrimination, and this right is applicable at all times, including during entry and reception of migrants.

The ECtHR has held, however, that Article 6.1 of the ECHR (the right to a fair trial) does not apply to proceedings regulating a person's citizenship or the entry, stay, and deportation of aliens, because such proceedings do not involve the "determination of his civil rights and obligations or of any criminal charge against him" within the meaning of this article.<sup>6</sup>

Besides the obvious right to nondiscrimination, the organs of the Council of Europe have recognized a series of procedural measures to protect asylum seekers in order to ensure that the proceedings are fair and that the examination is objective and carried out individually. The purpose of such safeguards is to prevent violation of the right to nonrefoulement. Hence, in *Human Rights Protection in the Context of Accelerated Asylum Procedures*, the Committee of Ministers lists substantive rights and procedural safeguards aimed at ensuring the respect of these standards in so-called fast-track procedures.<sup>7</sup> For instance, the guidelines provide for the right to information concerning the procedural steps to be taken in a language the asylum seeker understands but also for the right to legal advice and the right to have interviews carried out by qualified staff (Guidelines IV, VIII, and IX).

The ECtHR has also found that to protect asylum seekers against arbitrary removals and ensure that their applications are given serious examination, they should be provided with sufficient information about their entitlements and the procedures to be followed in a language they understand, and they should have access to a reliable communication system with the authorities. When necessary, they should be provided with interpreters during the interviews, which should be conducted by trained staff and with legal aid. Further, the ECtHR has warned against excessively long proceedings and delays in communication of the decision. Finally, asylum seekers have a right to an effective remedy and should be given an opportunity to challenge the decision. To this end, they should be given the reasons for the decision.<sup>8</sup>

## **Extradition/Expulsion of Migrants in Conformity with Human Rights Standards**

Article 1, Protocol no. 7 of the ECHR provides several safeguards relating to the expulsion of aliens. According to its explanatory report, the term "expulsion" comprises all forms of involuntary transfer of an individual from a territory.

The concept of expulsion is used in a generic sense as meaning any measure compelling the departure of an alien from the territory but does not include extradition. Expulsion in this sense is an autonomous concept which is independent of any definition contained in domestic legislation. Nevertheless, . . . it does not apply to the refoulement of aliens who have entered the territory unlawfully, unless their position has been subsequently regularised.<sup>9</sup>

In *Nolan and K. v. Russia*, the ECtHR stated, also, that the concept of expulsion is autonomous and independent of the definitions provided by domestic legislation. The ECtHR

explained that “[w]ith the exception of extradition, any measure compelling an alien’s departure from the territory where he was lawfully resident constitutes an ‘expulsion.’”<sup>10</sup>

While the protection of substantive human rights of migrants in expulsion is universally established and consistent between international and regional human rights systems, there are significant differences in the procedural protection in expulsion guaranteed by the various human rights treaties.

Along with procedural protection, a set of substantive rights has been established by international refugee law and by international standards on extradition to protect migrants potentially subject to expulsion. These rights interfere with the principle of territorial sovereignty because they limit states’ control over the entry of non-nationals into their territory and restrict their discretion regarding expulsions from their territory, where removal risks causing human rights violations.

The substantive rights of migrants in expulsion derive essentially from the principle of nonrefoulement, enshrined in Article 33 of Geneva Convention relating to the International Status of Refugees (1951), which prohibits the expulsion or return of a refugee “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” It was first established in 1933 by the League of Nations’ *Convention Relating to the International Status of Refugees*,<sup>11</sup> and it is further expressly provided for under Article 3 of the Convention against Torture, which prohibits the expulsion, return, or extradition of a person “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>12</sup> The principle of nonrefoulement is now recognized as a principle of customary international law binding on all states, tied to the obligation to recognize, ensure, and protect the human rights of all persons within their jurisdiction.<sup>13</sup> It is an absolute principle that cannot be subject to derogation.<sup>14</sup>

As mentioned, the principle of nonrefoulement is applicable to all forms of transfer, including extradition. Article 3 of the European Convention on Extradition and Article 5 of the European Convention on the Suppression of Terrorism assert the principle by excluding the granting of extradition where there are grounds to believe that the request was made for “the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.”

Pursuant to Article 33.1 of the Geneva Convention, the protection against refoulement covers migrants present in the territory and those at the border.<sup>15</sup> It further applies to both refugees and asylum seekers, whether they are undergoing the determination process or are intending to.

The risks to be considered are not limited to those residing in the country of origin or to non-national who have their habitual residence in the country of destination. The definition of those risks is much broader and extends to indirect refoulement. The protection is to be understood as taking into consideration the risks arising in any country where the migrant might be sent, including states themselves susceptible of transferring the individual to an unsafe country: “the principle of *non*-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.”<sup>16</sup>

Like the procedural protection of migrants in expulsion proceedings, the principle of nonrefoulement is subject to restriction. Under Article 33.2 of the Geneva Convention, the state may have reasonable grounds for regarding a refugee “as a danger to security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.” Within the meaning of the convention, the danger has to concern the country of refuge and plausibly threaten either the security or the community of the state in question.

The ECHR does not explicitly provide for the principle of nonrefoulement. But the ECtHR has recognized the principle through its jurisprudence, by deriving from Article 1 of the ECHR an implicit obligation of states parties to protect migrants against refoulement. It found that the obligation to “secure to everyone within their jurisdiction the rights and freedoms”<sup>17</sup> guaranteed by the ECHR, combined with the requirement that such rights be practical and effective, creates an obligation for states to abstain from deporting or extraditing non-nationals facing the risk of violation of their rights in the destination country.<sup>18</sup>

According to the court, the principle of nonrefoulement aims at protecting “the fundamental values of democratic societies.” The contracting states’ obligation to respect and ensure ECHR rights for all persons in their territory and all persons under their control entails a commitment not to extradite, deport, expel, or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 2 and 3 of the ECHR, either in the country to which removal is to be directed or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the ECHR obligations in such matters.<sup>19</sup>

The ECtHR has further specified that the principle of nonrefoulement applies where the expulsion or return would create a real and personal risk for the non-national. This means that the consequences of the removal must be foreseeable and that the risk faced by the person claiming the protection should be taken into account. In *Saadi v. Italy* it states, “In order to determine whether there is a risk of ill-treatment, the ECtHR must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.”<sup>20</sup>

Moreover, the court has emphasized that when the human right at stake is absolute (such as the prohibition of torture), the principle of nonrefoulement becomes absolute and is not subject to any exceptions, whether in law or in practice. This rule applies to all expulsions, regardless of considerations of national security or other strong public interests, economic pressures, or heightened influxes of migrants.<sup>21</sup>

Finally, the ECtHR has repeatedly held that diplomatic assurances (written guaranties by the authorities of the destination state to the expelling state that the person to be sent will not be subject to torture or to other violations of human rights) are highly unlikely to be sufficient to allow a transfer to countries where there are reliable reports that the national authorities tolerate torture.<sup>22</sup>

Regarding the assessment of the risk of human rights violation in cases of expulsion or return, the ECtHR has repeatedly agreed that the source of the risk did not necessarily have to be state agents and has applied the protection of the principle of nonrefoulement to threats of human rights violations by nonstate actors, such as family members or armed groups. That protection also applied when the state was incapable or unwilling to protect the person at risk.<sup>23</sup>

As in international refugee law, the definition of risk within the meaning of the jurisprudence of the ECtHR requires that the consequences of the removal or return be real and that they personally concern the individual claiming the protection of nonrefoulement. The ECtHR has asserted that there must be substantial grounds for believing that the risk is real and present, and not merely suspicions.<sup>24</sup>

As for the requirement of a personal risk, it presupposes that the non-national subject to the expulsion or return can demonstrate that he or she would be directly exposed to a violation of his or her human rights. The ECtHR has held, however, that the risk can be personal even when the person is not individually targeted but simply belongs to a group or is in a situation similar to that of persons whose rights are violated in the destination country. The non-national invoking the principle of nonrefoulement will in that instance have to

demonstrate that it is a general or widespread practice and that he or she would be identified as falling within the category subject to the abuses.<sup>25</sup>

In exceptional cases, the ECtHR has even recognized the existence of a real risk entailing the application of the principle of nonrefoulement where the general climate of violence in the country of reception was such that the person subject to the transfer would necessarily be exposed to the violence.<sup>26</sup>

Further, it should be noted that the Council of Europe has recognized that gender and sexual orientation may, for some countries, be sufficient grounds to require the protection of nonrefoulement. In the case *N. v. Sweden*,<sup>27</sup> for instance, the court has found that women could be a group at risk, and that the expulsion of an Afghan woman to her country would violate the principle of nonrefoulement.

In 2000, Europe was the world's largest host region for migrants, with 56.1 million people, representing 32.1 percent of total arrivals (174.8 million international migrants). Since then, Europe has been facing increasing pressure from migration.

This pressure has motivated the Council of Europe of forty-seven member states to act decisively for the protection of foreigners when they are seeking migration to Europe. Although the European legal order offers a high standard of human rights protection—having adopted, over the decades, the relevant instruments and developed effective mechanisms—the Council of Europe has used and still uses all the legal tools, such as resolutions and recommendations, provided by its internal order.

## Notes

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<sup>1</sup> *East African Asians v. the United Kingdom*, nos. 4403/70–4419/70, ECtHR, December 14, 1973.

<sup>2</sup> *Cyprus v. Turkey*, no. 25781/94, ECtHR (GC), May 10, 2001, pars. 306–311.

<sup>3</sup> For instance, in *D. v. the United Kingdom*, no. 30240/96, ECtHR, May 2, 1997, the applicant was suffering from advanced stages of a terminal HIV/AIDS; expulsion to the country of origin, known for its lack of medical facilities and appropriate treatment in such cases and where he would have no family or friends to care for him, would amount to inhuman treatment prohibited by Article 3. The ECtHR stressed the exceptional circumstances of the case and the compelling humanitarian considerations at stake.

<sup>4</sup> *Moustaquim v. Belgium*, no. 12313/86, ECtHR, February 18, 1991, par. 43: “The Court does not in any way underestimate the Contracting States’ concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. . . . However, in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of article 8 (art. 8-1), they must be shown to be ‘necessary in a democratic society’, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”

<sup>5</sup> *Solomou and Others v. Turkey*, no. 36832/97, ECtHR, June 24, 2008 (on the prohibition of arbitrary deprivation of life by a state agent).

<sup>6</sup> *G.R. v. the Netherlands*, no. 22251/07, ECtHR, January 10, 2012, par. 48: “Article 6 is not applicable to proceedings concerning the legality of an alien’s residence, which pertain exclusively to public law . . . ; moreover, the fact that such proceedings incidentally have major repercussions on the private and family life or on the prospects of employment of the person concerned cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention.”

<sup>7</sup> Committee of Ministers, *Human Rights Protection in the Context of Accelerated Asylum Procedures: Guidelines and Explanatory Memorandum* (Strasbourg: Council of Europe, 2009).

<sup>8</sup> *M.S.S. v. Belgium and Greece*, no. 30696/09, ECtHR (GC), January 21, 2011, pars. 300–302.

<sup>9</sup> Council of Europe, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Strasbourg: Council of Europe, 1984), par. 10.

<sup>10</sup> *Nolan and K. v. Russia*, no. 2512/04, ECtHR, February 12, 2009, par. 112.

<sup>11</sup> League of Nations, *Convention Relating to the International Status of Refugees* (Geneva: League of Nations, 1933), Article 3.

<sup>12</sup> United Nations General Assembly, *Convention against Torture and Other Inhuman or Degrading Treatment or Punishment*, adopted December 10, 1984.

<sup>13</sup> See, for instance, *Soering v. the United Kingdom*, no. 14038/88, ECtHR (Plenary), July 7, 1989, par. 87.

<sup>14</sup> United Nations General Assembly, “Human Rights and Mass Exoduses,” report A/52/644/Add.2, December 12, 1997, par. 3.

<sup>15</sup> United Nations High Commissioner for Refugees (UNHCR), Non-refoulement, Conclusion no. 6 (XXVIII), Executive Committee, 28th sess., 1977, par. (c).

<sup>16</sup> UNHCR, Note on Non-refoulement (submitted by the High Commissioner), UN Doc. EC/SCP/2, August 23, 1977, par. 4.

<sup>17</sup> *Saadi v. Italy*, no. 37201/06, ECtHR (GC), February 28, 2008, par. 127; *Chahal v. the United Kingdom*, no. 22414/93, ECtHR (GC), November 15, 1996, par. 79.

<sup>18</sup> *Soering v. the United Kingdom*, pars. 87 and 90: “The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. . . . In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.’ . . . It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3).”

<sup>19</sup> See *N. v. Sweden*, no. 14010/83, ECtHR, July 20, 2010, pars. 55 and 62. In this case, which involved an Afghan woman; the ECtHR found that, as a group, women are particularly at risk of ill-treatment in Afghanistan.

<sup>20</sup> *Saadi v. Italy*, par. 130.

<sup>21</sup> *M.S.S. v. Belgium and Greece*, no. 30696/09, ECtHR (GC), January 21, 2011, pars. 223–224: “The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation. The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision. That being so, the Court does not accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant’s complaints under Article 3.”

<sup>22</sup> *Soldatenko v. Ukraine*, no. 54131/08, ECtHR, October 23, 2008, par. 73: “The Court further notes that in his letter of 19 April 2007 the First Deputy Prosecutor General of Turkmenistan wrote that the requirements of Article 3 of the Convention on Human Rights and Fundamental Freedoms would be fulfilled in respect of the applicant and he would not be subjected to torture, inhuman or degrading treatment or punishment after extradition. The Court observes, however, that it is not at all established that the First Deputy Prosecutor General or the institution which he represented was empowered to provide such assurances on behalf of the State. Furthermore, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected. Finally, the Court notes that the international human rights report also showed serious problems as regards the international cooperation of the Turkmen authorities in the field of human rights and categorical denials of human rights violations despite the consistent information from both intergovernmental and non-governmental sources.”

<sup>23</sup> *N. v. Finland*, no. 38885/02, ECtHR, July 26, 2005, pars. 164–165: “The current applicant’s case differs from *H.L.R. v. France* in that the overall evidence before the Court supports his own account of his having worked in the DSP, having formed part of President Mobutu’s inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution. In these circumstances there is reason to believe that the applicant’s situation could be worse than that of most other former Mobutu supporters, and that the authorities would not necessarily be able or willing to protect him against the threats referred to. Neither can it be excluded that the publicity surrounding the applicant’s asylum claim and appeals in Finland might engender feelings of revenge in relatives of dissidents possibly affected by the applicant’s actions in the service of President Mobutu.”

<sup>24</sup> *Soering v. the United Kingdom*, pars. 85–91 (risk of “death row phenomenon”); *Cruz Varas and Others v. Sweden*, no. 15576/89, ECtHR (Plenary), March 20, 1991, par. 69 (risk of torture); *Chahal v. the United Kingdom*, no. 22414/93, ECtHR (GC), November 15, 1996, par. 74 (risk of treatment contrary to Article 3 ECHR); *Muminov v. Russia*, no. 42502/06, ECtHR, December 11, 2008, par. 130 (risk of a flagrant denial of a

fair trial in the requesting country); *Z and T v. the United Kingdom*, no. 27034/05, decision, ECtHR, February 28, 2006 (risk of a flagrant denial of freedom of religion).

<sup>25</sup> *Saadi v. Italy* (GC), pars. 132–133: “In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the ECtHR considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the ECtHR examines the case, the relevant time will be that of the proceedings before the ECtHR. . . . Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.”

<sup>26</sup> *Na v. the United Kingdom*, no. ECtHR, July 17, 2008, pars. 113–115.

<sup>27</sup> *N. v. Sweden*, par. 55.